MIDDLE EAST TANKERS AND FREIGHTERS

v.

THE OWNER OF THE VESSEL AND OTHER INTERESTED PARTY IN THE VESSEL OF M.V. "IRA" REGISTERED AT MONROVIA, LIBERIA

HIGH COURT MALAYA, JOHOR BAHRU
TUAN HAIDAR BIN MOHD. NOOR J
[ADMIRALTY IN REM NO: 27-1 OF 1995]
18 DECEMBER 1995

CIVIL PROCEDURE: *Plaintiff filing admiralty action in rem against owners of vessel - Defendant entering unconditional appearance - Defendant applying to strike out writ and statement of claim under O. 18 r. 19 of the Rules of the High Court 1980 - Plaintiff opposing application - Consideration of the principles applicable.*

SHIPPING LAW: *Plaintiff supplied bunker fuel to defendant's vessel - Plaintiff filing admiralty action in rem against defendants as owners of the vessel for the cost of the bunker fuel - Defendant filing unconditional appearance and defence - Defendant subsequently applying to strike out plaintiff's writ and statement of claim - Whether action in rem properly issued - Whether action in rem can only be issued if the person liable to the plaintiff in an action in personam is the owner/charterer of the vessel at the time the cause of action arose and is also the owner or demise charterer of the vessel at the time the writ was issued.*

The plaintiff filed an admiralty action *in rem* against the defendant for the sum of US$82,859.06 being the cost of bunker fuel supplied to the ship M.V. IRA at the request of the defendant. The owners of M.V. IRA, one Armonia Shipping and Finance Corporation caused an unconditional appearance to be entered to the suit and filed a defence to the plaintiff's claim. Subsequently the defendant filed a summons in chambers to strike out the writ and statement of claim under O. 18 r. 19 of the Rules of the High Court 1980 (RHC 1980) and sought various other reliefs.

The defendant denied having contracted with the plaintiff for the supply of bunker fuel to its vessel the M.V. IRA. The defendant argued that although it is the owner of the vessel an action *in rem* can only properly be issued out of the Court if the person liable to the plaintiff in an action *in personam* is the owner/charterer of the vessel at the time the cause of action arose and is also the owner or demise charterer of the vessel at the time the writ was issued. The defendant contended that as the charterparty between the defendant and one "Orion" made the bunker fuel the responsibility of Orion

and that as Orion was not the charterer at the time the writ was issued, the defendant is not liable *in personam* to the plaintiff and as such the writ *in rem* could not issue against the defendant.

The plaintiff contended that the issue of whether or not the defendant would be liable to the plaintiff on the claim is a matter that should properly go for trial and cannot be disposed of under O. 18.

Held:

[1] By entering unconditional appearance in the action, the defendant has waived all irregularity to the writ and is estopped from applying to strike out the plaintiff's suit. Following the case of *The Avro Venture* the rule in admiralty law is that after unconditional appearance has been entered the issue as to whether the defendant is or is not liable is a matter for trial and on this ground alone the defendant's application should be dismissed.

[2] It was clear from the evidence adduced that the plaintiff has shown that it has a reasonable cause of action against the defendant and that its claim is neither frivolous nor vexatious. The plaintiff is not a party to the charterparty and therefore did not have any notice of the existence of the charterparty between the defendant and Orion and neither was the plaintiff advised that the bunker fuel supply was for the sole account of Orion and not on the credit of M.V. IRA.

[3] From the documents adduced by both parties it was clear that there are issues of facts and law which can only be properly determined at a full trial with the benefit of *viva voce* evidence. In the circumstances it cannot be said that the claim of the plaintiff is on the face of it "obviously unsustainable".

[Defendant's application dismissed with costs]

Cases referred to:

Bandar Builder v. United Malayan Banking Corporation [1993] 4 CLJ 7, [1993] 2 AMR 34 ***(foll)***

The Avro Venture [1987] 1 MLJ 16 ***(foll)***

Schwarz & Co. (Grain) Ltd. v. "St. Elefterio" (Owners) [1957] 1 Lloyd's List Law Report 283 ***(refd)***

The "Wigwam" [1983] 1 MLJ 148 ***(refd)***

The Tolla [1921] Probate Division 22 ***(refd)***

The "Tanto Utama" [1995] 1 SLR 767 ***(refd)***

Gulf Venture [1984] 2 Lloyd's 445 ***(refd)***

Attorney General of Duchy of Lancaster v. L. & NW Ry. Co. [1892] 3 Ch. 274, CA ***(refd)***

The Moschanty [1971] Lloyd's Law Reports 37

Legislation referred to:
Courts of Judicature Act 1964, s. 23(b), 24(b)
Rules of the High Court 1980, O. 18 r. 19
Supreme Court Act 1981 (UK), s. 21, (4)

JUDGMENT

Haidar Mohd. Noor J:

Middle East Tankers and Freighters Sail (Offshore) ("the plaintiff") filed an admiralty action *in rem* against the owners of the vessel and other interested party in the vessel, M.V. 'IRA' registered at Monrovia, Liberia on 24 February 1995, as defendant, for US$82,859.06 being the cost of bunker fuels supplied to the ship M.V. 'IRA' at the request of defendant in or about 23 November 1994; contracted interest at the rate of 1.5% per month and costs of the action pursuant to s. 24(b) of the Courts of Judicature Act, 1964 (Act 91).

At the same time the plaintiff filed an *ex parte* summons-in-chambers with a certificate of urgency for a warrant of arrest be issued against the ship M.V. 'IRA'. The application is supported by the affidavit of Raj Sativale Ramachandran, the solicitor having conduct of the matter, on behalf of the plaintiff. As is usual, an undertaking was also filed in respect of any payments to the Sheriff in respect of the arrest of M.V. 'IRA'. An order for the arrest of M.V. 'IRA' was issued by the Court on 24 February 1995. M.V. 'IRA' was accordingly put under arrest when it berthed at the Pasir Gudang Port, Johor. It was subsequently released on a security provided by a third party.

It was the contention of the plaintiff that it had entered into a contract with the defendant for the supply of bunker fuels to M.V. 'IRA' (see exhibit 'RS-l'). The owner of M.V. 'IRA' at the time of the cause of action and the date of issue of the writ is Armonia Shipping and Finance Corporation ("Armonia"). This is not disputed. It was further contended by the plaintiff that through its agents, Frisol Bunkering B.V. of Netherlands ("Frisol") delivered a total quantity of 644.952 metric tonnes of bunker fuels to M.V. 'IRA' at the port of Emden on or about 26 November 1994 (see exhibits 'RS-2' and 'RS-3'). The plaintiff claimed to have invoiced the defendant the sum of US$82,859.06 for the bunker fuels sold and delivered and in spite of a final notice of demand and notice of institution of legal proceedings by the plaintiff dated 1 January 1995, the sum remained unpaid (see exhibits 'RS-4' and 'RS-5'). According to a check with the current entry from the Lloyd's Register of Ships 1993-1994 the owners of M.V. 'IRA' are described as Armonia. Shipping and Finance Corporation (see exhibit 'RS-6').

On 13 March 1995, M/s. Skrine & Co. entered **unconditional appearance** for Armonia as the defendant (encl. 13) and filed the defence on 27 April 1995 (encl. 11) to the plaintiff's statement of claim dated 30 March 1995 (encl. 10).

Subsequently, the defendant filed a summons-in-chambers dated 3 August 1995 (encl. 15) under O. 18 r. 19 of the Rules of the High Court, 1980 and its inherent jurisdiction to strike out the writ and the statement of claim (paragraph (a)). In addition thereto the defendant also prayed for the following:

(b) The guarantee dated 10 March 1995 given on behalf of the defendant to the plaintiff as security to the arrest of M.V. 'IRA' in respect of the claim filed be cancelled and discharged and that it be returned to the defendant;

(c) Damages suffered by the defendant for the wrongful arrest of M.V. 'IRA' be assessed by the Registrar;

(d) Alternative to an order under striking out of the writ and the statement of claim, the plaintiff's action filed herein be stayed permanently;

(e) Alternative to an order under (a) above, the guarantee dated 10 March 1995 granted on behalf of the defendant to the plaintiff as alternative security to the arrest of M.V. 'IRA' in respect of the claim filed by the plaintiff be reduced to a sum as is considered reasonable by this Honourable Court;

(f) Costs.

It is supported by the affidavit of K. Ananthan, a partner of M/s. Skrine & Co. and having conduct of this matter on behalf of the defendant (encl. 12).

The plaintiff, through the affidavit of Subky Elias Hakim, the chairman and general manager of the plaintiff company, (encl. 14), opposed the application of the defendant. An affidavit in reply was filed by K. Ananthan (encl. 16). There are two further affidavits of Subky Amin Hakim (encls. 17 and 26) and another affidavit of K. Ananthan (encl. 24) filed in respect of the application of the defendant.

At the hearing of encl. 15, learned Counsel for the defendant, Cik. S. Selvaratnam, intimated that she would not be proceeding with the alternative prayer (d).

The following facts would seem to be not disputed.

The owner of M.V. 'IRA' both in November 1994 and February 1995 was Armonia. The charterer of M.V. 'IRA' in November 1994 was Orion Maritime Ltd. ('Orion'). At the time the writ was issued, that is, February 1995, Orion was no longer the charterer of M.V. 'IRA'.

It was the contention of the defendant that an action *in rem* can only be properly issued out of this Court if:

(i) the person liable to the plaintiff in an action *in personam* is the owner/charterer of the vessel at the time the cause of action arose, as in this case, about 23 or 24 November 1994, and;

(ii) is also the owner or demise charterer of the vessel at the time the writ was issued, that is, 24 February 1995.

The defendant denied having contracted with the plaintiff for the supply of bunker fuels to its vessel M.V. 'IRA'. Though the defendant is the owner of M.V. 'IRA' but at the time of the issue of the writ Orion was no longer the charterer of M.V. 'IRA'. The plaintiff, according to the defendant's Counsel, cannot bring an action against it by reason of the personal liability of Orion. It was contended that the liability of Orion to the plaintiff will not suffice to entitle the issue of the writ *in rem*. The writ *in rem*, it seems, can only be issued if the owner, Armonia, is liable in an action *in personam* to the plaintiff. It was therefore, argued that a warrant of arrest of M.V. 'IRA' can only properly be issued if Armonia is liable in action *in personam* to the plaintiff for a warrant can only be issued after and pursuant to the issue of the writ *in rem*. The basis of the defendant's (Armonia's) application is that Armonia is not liable *in personam* to the plaintiff. The defendant relied on the following documents:

(a) the charterparty dated 6 May 1994 (exhibit 'A-3' in encl. 12);

(b) the off-line survey report dated 29 November 1994 (exhibit 'A-4' in encl. 1.2);

(c) the final line statement (exhibit 'A-4A' in encl. 12).

From the above exhibits it would seem to show that the bunker fuels were the responsibility of Orion. The defendant went one step further to say that on the facts, the law of agency was not applicable in this action. A number of authorities was cited in support thereof.

Be that as it may, the plaintiff contended that it had no knowledge of the charterparty between Armonia and Orion and one of the terms that Orion is to pay for the bunker fuels. It is not disputed that the plaintiff supplied the bunker fuels to M.V. 'IRA' through Frisol and accordingly paid Frisol for the supply of the bunker fuels to M.V. 'IRA' and the sum remained unpaid. The plaintiff said that the defendant as owner is liable whereas the defendant contended that it was not liable and that Orion is responsible for the payment of the supply of the bunker fuels to M.V. 'IRA' even though the defendant is the owner.

It seems clear that in an O. 18 application, the principles on which the Court will exercise its discretion are well established. The Supreme Court in *Bandar Builder v. United Malayan Banking Corporation* [1993] 2 AMR 34 at page 1975 stated:

The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19(l) RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this Rule (per Lindley MR in *Hubbuck v. Wilkinson*) [1899] 1 QB 86, p. 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable" (*Attorney General of Duchy of Lancaster v. L. & NW Ry. Co.* [1892] 3 Ch. 274, CA). It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence (*Wenlock v. Moloney* [1965] 1 WLR 1238, [1965] 2 All ER 871, CA. The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 (which is in *pari materia* with our O. 33 r. 2 RHC) (*Hubbuck v. Wilkinson*) *(supra)*. The Court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

In order to invoke admiralty jurisdiction, the plaintiff will have to fulfil the requirements specified in s. 21(4) of the UK Supreme Court Act of 1981 which is the law here by virtue of s. 23(b) of the Courts of Judicature Act, 1964. Section 21(4) of the UK Supreme Court Act, 1991 reads:

4. In the case of any such claim as is mentioned in s. 20(2)(e) to (r), where -

(a) the claim arises in connection with a ship; and

(b) the person who would be liable on the claim in an action in personam ("the relevant person") was, when the cause of action arise, the owner or charterer of, or in possession of or in control of, the ship, an action in rem may (whether or not the claim gives rise to maritime lien on the ship) be brought in the High Court against -

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of the ship as respects all the shares in it or the charterer of it under a charter by demise, or,

(ii) ...

(1) The plaintiff's claim falls under s. 20(2)(m), being goods or materials supplied, that is, bunker fuels.

(2) The claim arises in connection with the ship M.V. 'IRA' in which the plaintiff supplied bunker fuels to it.

(3) The person who would be liable in an action *in personam* ("the relevant person") was when the cause of action arose the owner or charterer of, or in possession or in control of the ship. The defendant would be liable to the plaintiff in an action *in personam* as the defendant was when the cause of action arose the owner of M.V. 'IRA' and is the beneficial owner of all the shares when this action was brought.

The defendant, it would seem, impliedly accepts (1) and (2) but denies (3). In other words, the defendant denies that it is the person who would be liable to the plaintiff.

It was the contention of the plaintiff that the issue of whether or not the defendant would be liable to the plaintiff on the claim is a matter that should properly go for trial and cannot be disposed of under O. 18.

The plaintiff relied on two grounds.

Ground (1) - Unconditional appearance by the defendant

The plaintiff contended that by entering **unconditional appearance** in the action, the defendant has waived all irregularity to the writ and is estopped from applying to strike out the plaintiff's suit. If the defendant desired to question (3) above it should enter **conditional appearance** in the action and move this Court to set aside the writ and the warrant of arrest. The rule in admiralty law is, it would seem, after **unconditional appearance** has been entered, the issue as to whether the defendant is or is not liable is a matter for trial.

Towards this end, the learned Counsel for the plaintiff relied on the Singapore case of *The 'Avro Venture'* [1987] 1 MLJ 16. The facts are almost identical with the present suit. There the plaintiff arrested the ship 'Avro Venture' for a bunker claim. The defendants put up security for the plaintiffs' claim, had the ship released from arrest and entered **unconditional appearance** in the suit. Later, the defendants took out an application to strike out the plaintiffs' suit and sought the cancellation of the security on the grounds that admiralty jurisdiction cannot be invoked against them. It was held that "under the Rules of Court a defendant who objects to an irregularity in the writ of summons or the service of the writ or to jurisdiction must, if he wants to raise the ground, enter conditional appearance ... But, as they had **entered unconditional appearance,** they may not raise it now at this stage of the proceedings" (emphasis is mine). The Singapore Court of Appeal affirmed the judgment of the learned High Court Judge (see [1988] 1 MLJ 147).

On this ground alone, the plaintiff should succeed to get the Court to dismiss the defendant's application.

Ground (2)

Plaintiff is entitled to have the issue of whether or not the defendant is or is not the person who would be liable be determined at the trial.

In support thereof, learned Counsel relied on the case of *Schwarz & Co. (Grain) Ltd. v. "St. Elefterio" (Owners)* [1957] 1 Lloyd's List Law Report 283. There the defendants, as in this action, applied to set aside the writ and warrant of arrest on the grounds that before the plaintiffs can proceed *in rem*, plaintiffs must show that the owners of the ship proceeded against are persons

who would be liable on the claim in an action *in personam*. Willmer J, interpreting what is now s. 21 of the Supreme Court Act, 1981 (the successor to s. 3(4) of the Administration of Justice Act 1956) rejected this argument in the following words at page 287 thereof:

> ... The words used, it will be observed, are "person who would be liable, not the person who is liable", and it seems to me, bearing in mind the purpose of the Act, that the natural construction of those quite simple words is, "the person who would be liable on the assumption that the action succeeds". This action might or might not succeed if it were brought in personam: that would depend upon the view which the Court ultimately took of the various contentions raised by Mr. Roskill. But clearly, if the action did succeed, the person or persons who would be liable would be the owner or owners of the steamship St. Elefterio. In such circumstances, in the absence of any suggestion that the action is frivolous and vexatious action, I am satisfied that the plaintiffs are entitled to bring it and have it tried, and that, whether or not their claim turns out to be a good one, they are entitled to assert that claim by proceeding in rem.

Nearer home, we have the Singapore case of *The 'Wigwam'* [1983] 1 MLJ 148 where at page 150 Chua J said: "that before a plaintiff can proceed in rem of a claim under s. 3(l)(1) or (m) of the Act he need not prove at the outset that he has a cause of action substantial in law". Quoting with approval the case of 'St. Elefterio', *supra*, His Lordship went on to say:

> I am of the view that the plaintiffs are entitled to bring this action and to have it tried and that, whether or not their claim turns out to be a good one, they are entitled to assert their claim by proceeding in rem.
>
> With respect, I entirely agree with such a view.

I would next have to consider, as the defendant seemed to suggest, whether the plaintiff has a reasonable cause of action and its claim is neither vexatious nor frivolous.

The plaintiff contended that it supplied the bunker fuels on the credit of M.V. 'IRA' in which the defendant as owner would be liable to the plaintiff. In support thereof, the plaintiff relied on the following evidence:

(a) Proforma Contract (exhibit 'SH-l' at page to encl. 14) states bunkers will be supplied for, the account of master and owner of M.V. 'IRA'

(b) Confirmation/Acceptance of contract by the plaintiff states the order is accepted on the basis that the master/owner is a buyer (see exhibit 'SH-4' in encl. 17).

(c) The Master/Chief Engineer has made a written request to plaintiff's supplier for the supply of bunkers to M.V. 'IRA' (see exhibit 'SH-6' in encl. 26).

(d) Plaintiff's invoice No. Evd. /1292/94 for the bunkers supplied to M.V. 'IRA' is addressed:

> "Master/Owner M.V. 'IRA' and Messrs Orion Maritime and/or Silver Line c/o Marine Oil Broking Limited."
> (See exhibit 'SH-1' at page 20 in encl. 14).

(e) The bunker receipts signed by the defendant's servant and employee clearly show that the supply was on the credit of M.V. 'IRA' as follows:

> No disclaimer stamp of any type or form will be accepted on this bunkering certificate, nor, should any such stamp be applied, with alter, change, or waive sellers/suppliers lien against the vessel or waive vessel's ultimate responsibiltiy and liability for the debt incurred through this transaction. (See exhibit 'SH-l' at page 15 of encl. 14).

Further, in exhibit SH-1 at page 16 of encl. 14 the following is clearly endorsed and it appears directly above the signature of the master/chief engineer (an employee of the defendant):

> The above bunkers and samples received in good order and bought and sold on credit of the vessel for continuation of the voyage.

From the above evidence and the authorities it would seem clear that the plaintiff has shown that it has a reasonable cause of action against the defendant and its claim is neither frivolous nor vexatious. It would be diffferent perhaps if in November 1994 and February 1995 the defendant was not the owner of M.V. 'IRA'.

The defendant alleged that it was unaware of some of the documents relied on by the plaintiff. Be that as it may, its main defence seemed to hinge on the fact that the supply of bunkers are for the account of its charterer, Orion and there is no contract between itself and the defendant. However, the plaintiff is not a party to the charterparty and therefore did not have any notice of the existence of the charterparty between the defendant and Orion and also its terms. Neither was the plaintiff advised that the bunker supply is for the sole account of Orion and not on the credit of M.V. 'IRA'.

In *the Tolla* [1921] Probate Division, page 22, it was held that the master had authority to pledge the owner's credit, and that even if the master had told the plaintiff that his vessel was under time charter it would not affect the owner's liability *in rem* unless he also told the plaintiff that under the terms of the charterparty the expenses in respect of which the disbursements were made were payable by the charterer and not by the owners. Even if the charterer, as alleged by the defendant, is responsible for the payment of the

bunkers under the charterparty, it does not necessarily follow that as between itself and the bunker supplier, it is not liable. The question was whether those who dealt with the plaintiff had the authority of the owner, actual or apparent, to do so and whether the plaintiff intended to contract with the owner (see *'The Tanto Utama'* [1995] 1 SLR 767).

From clause 67 of the charterparty (exhibit 'A-3' in encl. 12) the defendant's charterer can bind the defendant in a contractual relationship with third parties (see exhibit 'A-3' at page 21 of encl. 12). In *Gulf Venture* [1984] 2 Lloyd's 445 Shean J, at page 448 said:

> It seems to me strongly arguable that shipowners are bound by the acts of their agents who acted through their sub-agents in asking plaintiffs to make payments on their behalf. ... But the fact that the principal is not identified does not have the result that he is not liable to reimburse the shipping agent.

It seems clear to me that there are issues of facts and law which can only be properly determined at a full trial with the benefit of *viva voce* and not on affidavit evidence at this interlocutory stage.

In the circumstances it cannot be said that the claim of the plaintiff is on the face of it "obviously unsustainable" (see *AG of Duchy of Lancaster, supra.*).

In view of my finding in respect of prayer (a) of encl. 15 there is no necessity for me to consider prayers (b) and (c) at the present stage.

In respect of the non-disclosure issue raised by the learned Counsel for the defendant at the time the *ex parte* application for the arrest of M.V. 'IRA' by the plaintiff, the short answer is that it was never raised by the defendant in its application (encl. 15) except subsequently by way of affidavit evidence (encl. 24). Be that as it may, in my view, the plaintiff has sufficiently disclosed the documents that were available to them at the time of the *ex parte* application for the warrant of arrest of M.V. 'IRA'. I am not persuaded to set aside the arrest and order the release of M.V. 'IRA' on this ground.

The defendant contended that the security provided by it through a third party for the release of M.V. 'IRA' is excessive and oppressive. It is not disputed that there was negotiation between the parties as to the amount of security to be provided by the defendant. The guarantee dated 10 March 1995 is not a bank guarantee or a bail bond paid into Court. It is simply a letter of undertaking given on behalf of the defendant by a third party. The sum of US$197,482.21 stated in the letter of undertaking was freely negotiated between the parties' solicitors. There is no evidence shown by the defendant that the said figure was literally pushed down its throat but rather the plaintiff's original figure of US$207,432.21 was subsequently agreed to be reduced to US$197,482.21. It may be slightly on the high side but certainly it is not

excessive and oppressive, having regard to the elements of interests and costs. In the result, I am of the opinion that the sum agreed for the security is reasonable. Therefore I am not inclined to disturb it (see the *Moschanthy* [1971]/Lloyd's Law Reports 37).

In the circumstances the application of the defendant is dismissed with costs.

Reported by Satish Nair